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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 528

WILLIAM HEIKKILA,
Petitioner,

vs.

BRUCE G. BARBER, Individually and as District Director of Immigration and Naturalization,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner William Heikkila respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on October 13, 1954.

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Appeals for the Ninth Circuit is reported at 216 F. 2d 407. It appears in the record at page 32.

JURISDICTION.

The judgment of the Court of Appeals was filed and entered on October 13, 1954 (R. 36). No petition for rehearing was filed. Jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED.

(1) May an alien obtain review of a final order for his deportation which was made and entered prior to the effective date of the Immigration and Nationality Act, by a suit for an injunction, a declaratory judgment and review under the Administrative Procedure Act, commenced after the effective date of the Immigration Act?

(2) Was the decision of this Court in *Heikkila v. Barber,* 345 U.S. 229, *res judicata* of Heikkila's right to obtain injunctive and declaratory relief and a review of the deportation order under the Administrative Procedure Act (a) on the merits of the issues presented in that prior case, and (b) on the merits of an additional issue presented in the present case?

(3) Is the requirement of a fair hearing met in a deportation proceeding on the charge of former mem-

bership in the Communist Party where the alien is denied an opportunity to establish by competent evidence (a) that the Communist Party to which he had belonged did not at the time of his membership advocate overthrow of the Government by force and violence, and (b) that if it did so advocate, he had never subscribed to such advocacy?

(4) Is a statute providing for the deportation of an alien by reason of former membership in the Communist Party invalid as a bill of attainder, an *ex post facto* law, and as contravening the provisions of the First and Fifth Amendments to the Constitution, on its face or as applied, where if undenied allegations are taken as true the record shows that (a) the Communist Party did not during the alien's membership advocate overthrow of the Government by force or violence, and (b) further that petitioner at no time so advocated, and (c) that the petitioner during the course of his membership in the Communist Party had no knowledge of such advocacy by that organization?

(5) Is the deportation order challenged here invalid under the Fifth Amendment's prohibition against testimonial compulsion because this deportation order is based exclusively on appellant's own prior admission, obtained during a prior unlawful hearing and admitted over appellant's objection?

(6) Is the deportation order challenged here invalid because the hearings upon which it is based were conducted by a hearing officer who combined

in his official duties the role of prosecutor and hearing officer?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

A. The statute, pursuant to which petitioner's deportation has been ordered and the constitutionality of which is attacked in the complaint, reads in relevant part:

> "Any alien who is a member of any one of the following classes shall be excluded from admission into the United States:
> * * * * * * *
>
> "(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:
> * * * * * * *
>
> "(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, * * * or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt; * * *" (Act of September 23, 1950, P. L. 831, 81st Cong., 2nd Sess., Ch. 1024, Sec. 22, 64 Stat. 987, 1006.)
>
> (a) Any alien who was at the time of entering the United States, or has been at any time thereafter * * * a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner

provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States." (Act of September 23, 1950, P. L. 831, 81st Cong., 2nd Sess., Ch. 1024, Sec. 22, 64 Stat. 987, 1008.)

B. The provisions of the Immigration and Nationality Act of 1952 which were in effect at the time the complaint was filed are in relevant part:

"(c) When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, * * *

"(d) Any alien against whom a final order of deportation as defined in subsection (c) of this section, heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and

proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall upon conviction be guilty of a felony, and shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both." (8 USCA 1252.)

C. The provisions of the Administrative Procedure Act which appellant asserts govern the procedure to be employed in this proceeding read in relevant part:

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion

"(a) Any person suffering legal wrong because of an agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory in-

junction or habeas corpus) in any court of competent jurisdiction * * *" (5 USCA 1009.)

D. The Fifth Amendment to the Constitution of the United States reads as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE.

Petitioner was born in Finland in 1906 and came to the United States at the age of about 2½ months with his parents. He has resided in the United States ever since (R. 4). In 1947 deportation proceedings were commenced against him on the ground of then present membership in an organization that advocated the overthrow of the government by force and violence. No evidence to support this charge was ever presented. Hearings were held which did not conform to the requirements of the Administrative Procedure Act (5 USC 1001, et seq.). During this hearing petitioner testified (in order to establish his

capacity to testify on the aims of the Communist Party) that he had from 1929 to 1939 been a member of the Workers Party and its successor, the Communist Party (R. 7).

After the decision by this Court in *Wong Yang Sung v. McGrath,* 339 U.S. 33, those hearings were abandoned and new hearings instituted before a hearing officer who purported to have been appointed under and to conduct the hearings in accordance with the Administrative Procedure Act (R. 7). During the course of the hearing, the hearing examiner admitted into evidence over petitioner's objection the admission of membership in the Communist Party referred to above. Between the first hearing in 1947 and the subsequent hearing in 1950 the Internal Security Act of 1950 had been passed. It allowed deportation for former membership in the Party.

After the admission of his testimony from the former hearing, petitioner offered to prove that the Workers Party and the Communist Party of the United States during the period of his membership did not advocate overthrow of the government by force or violence, and that he personally had not at any time so advocated. The offer of proof was rejected by the hearing examiner (R. 10). At the time, the only charge against petitioner was present membership in an organization that advocated overthrow of the government by force and violence.

After the admission of petitioner's testimony from the prior hearing, a new charge was lodged, to wit, that petitioner had been since entry a member of the Com-

munist Party of the United States. All evidence save and except petitioner's testimony regarding his membership was stricken from the record and petitioner was ordered deported solely on the ground that he had been since entry a member of the Communist Party (R. 11). After an appeal to the Board of Immigration Appeals this order became final on January 11, 1952 (R. 11).

In July 1952 the District Director of Immigration and Naturalization sought to take petitioner into custody and deport him. Petitioner filed an action in the United States District Court at San Francisco seeking an injunction, a declaratory judgment, and a review of agency action. That complaint was ordered dismissed by a three judge court and this Court accepted a direct appeal. It affirmed the decision of the District Court, by its opinion in *Heikkila v. Barber,* 345 U.S. 229.

On July 24, 1952, after the effective date of the Immigration and Nationality Act (8 USC §1101, et seq.), this present action was begun (R. 16). It alleged all of the foregoing facts. In addition to the foregoing allegations contained in the prior complaint for injunction, it alleged that if the Communist Party did during the period of petitioner's membership advocate the overthrow of the government by force and violence, nevertheless "the plaintiff did not know that [it] so advocated" (R. 8).

The allegations of this complaint were not denied, but upon the issuance of an order to show cause the defendant Barber moved for an order dissolving

the temporary restraining order and dismissing the action (R. 18). This motion was granted (R. 21), notice of appeal was filed (R. 23), and the decision of the District Court was affirmed by the Court of Appeals for the Ninth Circuit (R. 32).

Two judges held that the decision of this Court in the prior case was *res judicata* of the issues in this case. The third judge dissented from their reasoning, stating that in his opinion the prior decision of this Court was not *res judicata,* but that the decision of the District Court should be affirmed because the Immigration and Nationality Act did not authorize review by means other than habeas corpus of an order entered prior to the effective date of that Act.

REASONS FOR GRANTING THE WRIT.

(1) TO SETTLE CONFLICTS IN THE COURTS OF APPEALS.

The availability of review of deportation orders by injunction or declaratory judgment actions or by petition for review under the Administrative Procedure Act is now in serious doubt. In *Batista v. Nicolls,* 213 F. 2d 20, the First Circuit in an opinion by Magruder, J., states the view of that circuit that no such review was made possible by the passage of the Immigration and Nationality Act (8 USC §1101, et seq.).

In the Second Circuit, on the other hand, the case of *Pedreiro v. Shaughnessy,* 213 F. 2d 768, with an

opinion by Medina, J., holds that the necessity of a plain, speedy and inexpensive remedy which does not require the surrender of the alien's liberty supports the decision of the Court of Appeals for the District of Columbia in *Rubinstein v. Brownell,* 206 F. 2d 449, affirmed by this Court, 346 U.S. 929. Judge Medina says (at 769):

> "The aliens involved in deportation proceedings are often in poor financial circumstances; the validity of final orders of deportation generally, if not always, depends upon questions relating to the alleged infringement of the deportees' constitutional rights; their imprisonment or enlargement on bail and the actual deportation itself affect human relationships of the highest consequence. Under these circumstances it would seem that the courts must be able to spell out some simple formula, which will cut through red tape, face realities, and provide an expeditious and inexpensive remedy, with a minimum amount of procedural frills and a maximum amount of attention to the question of whether or not the administrative proceedings against the deportee have conformed to the requirements of due process."

The opinion notes the conflicting view of the First Circuit in *Batista v. Nicolls,* supra.

In the Ninth Circuit in the case at bar the decision of a majority of the Court went off on the ground that the prior decision of this Court was *res judicata.* Judge Pope, while concurring in the result would hold however that the 1952 statute did not have a "retroactive effect" so as to allow review of an order

entered prior to the effective date of the Act. He bases this opinion upon what he assumes to be a difference between the quantum of evidence required to support a deportation order under the new Act and under the preceding law and upon the savings clause of the 1952 Act (8 USC §1101 note).

Further doubt on the question of availability of non habeas corpus review has been expressed in the Ninth Circuit in the opinion of Mathews, J., in *Rodrigues v. Landon,* 212 F. 2d 508, where a ruling on the availability of such review was expressly reserved.

As Judge Medina has aptly put it, justice to aliens to be practical must be plain and speedy and should not exact as part of its cost the surrender of liberty. It is argued below that the passage of the 1952 Act itself has seriously hampered the effectiveness of habeas corpus as a practical mode of obtaining this review. Deportation cases are notoriously slow of final adjudication. Undoubtedly numbers of cases now pending involve deportation orders entered prior to the effective date of the Immigration and Nationality Act. The Second Circuit and the Circuit for the District of Columbia allow review in the mode attempted here. The First Circuit does not. The Ninth Circuit is in doubt whether to allow it or not. It is of the utmost importance in the administration of justice that the conflict among circuits on the procedural question be resolved.

(2) THE NECESSITY FOR NON HABEAS CORPUS REVIEW.

In opposing review of a deportation order by proceedings other than habeas corpus, the Government has admitted that some more effective procedure than habeas corpus is needed. This Court has so noted in its opinion in the earlier *Heikkila* case, 345 U.S. at 237. Many considerations combine to support this view.

Habeas corpus requires that the petitioner be in custody before the writ can be filed. This in any situation exacts a high price for the right to seek vindication of constitutional liberties.

As the Court of Appeals for the District of Columbia pointed out in *Rubinstein v. Brownell*, 206 F. 2d 449, the legislative history of the Immigration and Nationality Act demonstrates almost beyond any question that the Congress recognized the necessity for non habeas corpus review of deportation orders and intended that review in the nature of review under habeas corpus should be available under the new Act.

The passage of the 1952 Act has in and of itself made even more acute than it was before the need for non habeas corpus review. In Section 242(d) of the Act (8 USC §1252(d)) it is provided that the Attorney General has supervisory power over aliens who have been ordered deported but whose deportation has not been effected in the six month period following the issuance of the final order. The supervisory power thus granted allows the Attorney General to require reporting to immigration officials at any intervals deemed proper by the Service, sub-

mission to medical and psychiatric examination, and questioning under oath about any subject which the Attorney General may deem fit and proper. In addition, the Attorney General may specify any restrictions on the alien's conduct or activities which he deems reasonable. Since it is frequently the case that deportation cannot be carried out for months or years and that in many cases it can never be carried out, this means that under the Immigration and Nationality Act the Attorney General may be given power to regulate the conduct and activities of those against whom a final deportation order has been entered from a date six months after the entry of the order until the death of the alien.

With such power remaining unreviewable until the alien has been taken into custody because no petition for habeas corpus can be filed until that occurs persons who are not aliens may be subjected to such regulation as the statute authorizes, with no opportunity at any time to test the question of alienage. Aliens who are not in fact and in law deportable may nevertheless be treated as though they were deportable and subjected to the same regulations from a period six months after the deportation order becomes final until the ends of their lives.

This is no fanciful parade of horrors. The availability of review by habeas corpus is by this statute placed completely in the hands of the very agency responsible for the deportation order. At no time is it necessary under the statute that one against whom deportation is sought be taken into custody. A war-

rant may be served, and the alien or putative alien allowed to remain at liberty during the entire administrative process until six months after a final order of deportation has been entered. During that period he could not file a petition for habeas corpus. After the six month period had passed, it would be impossible for him to obtain review by habeas corpus even should the Immigration Service be willing to cooperate with him in that regard unless and until the Service was prepared to take him into custody to actually deport him, for under Section 242(d) of the Act the Service is without any power whatever to imprison a deportee after the six months period has elapsed. (*Shrode v. Rowoldt,* 213 F. 2d 810.) Indeed, it is not certain that the Service has the power to do more than order the alien to report aboard the vessel or aircraft in which he is to be deported at the moment set for its departure.

Even if as a practical matter the Immigration Service does take aliens into custody before the actual moment for their departure from the United States under a deportation order, the possibility of drafting, filing and serving a complaint for habeas corpus may be purely hypothetical. If the alien is taken into custody on short notice, on week-ends or holidays, it is often as a practical matter impossible to effectively commence a petition for habeas corpus before the actual deportation is carried out.

This is a question of extreme importance in the administration of the immigration laws. The Service

has been applying the provisions of Sec. 242(d) to those against whom final orders of deportation were entered under the 1917 Act. If as Judge Pope thought in the case at bar, Sec. 405 of the 1952 Act containing the savings clause prevents the application even of the procedural aspects of the 1952 Act to those against whom deportation orders were entered under the preceding law, then the Attorney General has no power whatever to control the conduct association and activities of aliens ordered deported. This inability to obtain any review of deportation orders is certainly contrary to the Congressional intent as revealed by the legislative history which the Court of Appeals for the District of Columbia analyzed in *Rubinstein v. Brownell.* Furthermore, it is revolting to suppose that one may be wrongfully ordered deported and subjected to the onerous regulation of one's daily life which this Act allows without any opportunity to obtain adjudication of one's rights.

Furthermore, if the rule is that one whose deportation order was entered under the 1917 Act may not obtain review except by habeas corpus while others who were ordered deported under the latter statute may obtain such review, there would appear to be no method free from doubt for contesting the attempt of the Immigration Service to impose restrictions on conduct which are authorized only by the new statute. One can, it is true, refuse to obey the regulations or orders of the Service and risk prosecution for a felony. This is indeed a penalty which has long been recognized as an improper price to pay for an opportunity to test one's rights in the courts.

(3) IMPORTANT QUESTIONS OF CONSTITUTIONAL LAW ARE INVOLVED IN THIS CASE.

In its decision in the prior case this Court noted the presence of constitutional questions, some of which it has since passed upon in the case of *Galvan v. Press,* 347 U.S. 522. There the Court admitted deep doubts as to the justice of the law that has been developed in its decisions and in congressional enactments on the subject of deportation. One important question presented by this case and that might have been thought to be clearly presented in *Galvan v. Press* was not mentioned or passed upon by the Court. That was the question whether the statute there and here attacked constitutes a bill of attainder.

Only political considerations, not logic or principle or justice, can support the view that although it is a bill of attainder to provide in a statute that salaries may not be paid to certain persons out of monies appropriated by Congress (*United States v. Lovett,* 328 U.S. 303) and that it is a bill of attainder to provide that persons who have taken up arms against the Government of the United States in an attempt to overthrow it may not teach or practice law (*Cummings v. Missouri,* 4 Wall. 277; *Ex parte Garland,* 4 Wall. 333), yet it is not a bill of attainder to drive out of the country and separate forever from his family, his livelihood and his friends one whose only activity was joining an organization which was determined by the Courts to be a lawful organization (*Communist Party v. Peek,* 20 Cal. 2d 536) when he held the view which this Court has held was a tenable view (*Schneiderman v. United States,* 328 U.S. 118)

that that organization did not advocate overthrow of the Government by force and violence.

In *Galvan v. Press* the possibility that the statute there and here under attack was a bill of attainder is mentioned only in dissenting opinions. That decision is no authority at all upon the important question whether it is in fact a bill of attainder to prescribe deportation for membership in a named organization without any mention of the nature or characteristics of the organization. It is a matter of common experience that the same organization may signify different things to different members. This is true of even the most non-political organizations. It is hard indeed to justify then a statute which assumes that an organization had a certain meaning and character and which imposes sanctions on those who belong to it, without regard to what the organization signified to them.

The question here arises in a different context than that of *Galvan v. Press.* In the latter case no successful argument could have been made by Galvan that the Communist Party to which he belonged at the time that he belonged to it did not advocate overthrow of the Government by force and violence. He did not contest the view that it did so advocate. Indeed, since he had offered to return to the Party as an agent for the FBI, he could scarcely advance such an argument. Having thus admitted that the Communist Party was of a certain reprehensible character, the question whether the statute was a bill of attainder could not be raised.

Heikkila, however, presents the question in this form: Where the charge against him was membership in an organization that advocated overthrow of the Government, Heikkila in the deportation proceeding itself offered to prove that the Communist Party at the time that he belonged to it did not so advocate. And this offer of proof was rejected. If, as this Court held in *Harisiades v. Shaughnessy,* 342 U.S. 580, deportation of aliens for former membership in an organization that advocates overthrow of the Government is valid because for twenty years aliens have known that membership in such organizations was forbidden, then *when it is raised as an issue,* the question of knowledge that the organization to which one belongs did so advocate is material. Petitioner here recognizing its materiality offered to establish in effect that his membership was innocent. Cf. *Wieman v. Updegraf,* 344 U.S. 183. The hearing officer ruled that this was an immaterial consideration by rejecting the offer of proof.

Another aspect of the scienter question as it arises in this case is whether a hearing in which an alien offers to prove that the organization to which he belonged did not come within the ban can be said to have been a fair hearing as guaranteed by the due process clause of the Fifth Amendment. This question requires adjudication.

Finally on this point, another facet of this question appears in the dismissal of the complaint below. This was done although the complaint contained an allegation undenied (and therefore required to be taken

as true) that if the organization did advocate violent overthrow, the plaintiff did not know that it so advocated. Such a ruling can only be sustained by reading *Galvan v. Press* as meaning that membership in a Communist organization can never be innocent. Yet it is fairly certain that this Court did not mean in *Galvan* to overrule *Wieman v. Updegraf*.

Indeed the Immigration Service so understood it. In *Garcia v. Landon,* No. 118 this Term, the questions presented were almost indistinguishable from those in *Galvan v. Press*. Yet the Government in that case filed a Memorandum Suggesting That The Cause Is Moot. It pointed out that in view of the opinion of this Court in *Galvan v. Press* that there might be situations where membership "would be so nominal as to keep an alien out of the deportable class" the Service had asked the Board of Immigration Appeals to withdraw the warrant of deportation outstanding against Garcia. This had been done, the Government stated, and the case reopened to afford petitioner an opportunity to present such further evidence as he wished on whether his membership in the Communist Party was voluntary and to file an application for discretionary relief. This suggestion was accepted by the Court and the cause was dismissed. 99 L. Ed. (Adv.) 48.

(4) THE DEPORTATION ORDER WAS MADE POSSIBLE BY A VIOLATION OF THE PRIVILEGE AGAINST SELF-INCRIMINATION.

This case presents the question whether the hearing accorded petitioner was fair where it allowed the admission of plaintiff's prior testimony although that testimony was at the time incompetent, irrelevant and immaterial to the charge. Subsequently a new charge to which the testimony thus admitted was material and relevant was lodged against petitioner. The first charge was thereupon completely disregarded and the deportation order based solely upon the testimony thus admitted over petitioner's objection and upon the lodged charge—membership in the Communist Party.

A fair hearing requires notice of the charges before evidence is introduced. Only by such notice can the relevance and materiality of evidence be determined. Yet in this case, as it customarily does, the Immigration Service first admitted the evidence over objection and then leveled the charge to which that evidence was material.

The testimony of petitioner regarding his membership in the Communist Party was given at a time when it was impossible to deport an alien for former membership in that organization. The admission of such testimony at a subsequent date (when the statute had been changed) when it was irrelevant to the charge presents a question of denial of due process of law, in violation of the guarantee against self-incrimination.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
January 3, 1955.

Respectfully submitted,
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(Appendix Follows.)

Appendix

United States Court of Appeals
for the Ninth Circuit

William Heikkila, Appellant. vs. Bruce G. Barber, Individually and as District Director of Immigration and Naturalization Service, Appellee.	No. 13,988 Oct. 13, 1954

Appeal from the United States District Court for the Northern District of California, Southern Division.

Before: Healy, Orr, and Pope, Circuit Judges

Per Curiam

On January 11, 1952 a final order for the deportation of appellant was made on the ground that he, an alien, had been a member of the Communist Party from 1929 to 1939, a period subsequent to his entry into this country.[1] He thereupon brought an action against the District Director of the Immigration Service by a complaint seeking "review of agency ac-

[1]The order was based on §22 of the Internal Security Act of 1950, 64 Stat. 1006, making membership in the Communist Party *per se* a ground for deportation.

tion," plus injunctive and declaratory relief. On dismissal of the suit by a three-judge court he appealed to the Supreme Court, which, on March 16, 1953 affirmed the dismissal, holding that habeas corpus provided the sole judicial remedy. *Heikkila v. Barber,* 345 U.S. 229.

Subsequently appellant brought in the court below a second action against the District Director leveled against the same deportation order and seeking the same relief as before. His complaint was dismissed on motion of the government and the matter is before us on appeal. Confronted with the Supreme Court's holding above cited he contends that the Immigration and Naturalization Act of 1952, 66 Stat. 163, affords him a remedy, other than by habeas corpus to inquire into the validity of the deportation order. He necessarily concedes that the Act now relied on was in effect at the time of the Supreme Court's adverse holding, supra—a circumstance of which the Court was aware and of which passing notice was taken in a footnote to its opinion. The new issue introduced in this second suit was one which appellant could have raised and litigated before the Court on the first appeal.[2] There is nothing in the Court's opinion to indicate that a problem as to the Act's possible bearing on the question of remedy was to remain open for further litigation. The very language of the opinion shows that the Court thought it was finally deciding the point

[2]That appeal was not argued until February 4, 1953, well over a month after the 1952 Act by its terms became effective, namely on December 24, 1952. It may be observed here that the Act had actually been passed and approved much earlier in the year.

of appellant's judicial remedy as respects the deportation order of January 11, 1952. For example, at page 235 of the opinion it said: *"Now, as before,* he [appellant] may attack a deportation order only by habeas corpus." [Emphasis ours.] In these circumstances it is for the Supreme Court, not for us, to say that despite its ruling a second attack of the identical nature and directed toward the same order may properly be waged.

Appellant points to the decision of the Court of Appeals of the District of Columbia Circuit in *Rubinstein v. Brownell,* 206 F. 2d 449 (1953), affirmed without opinion by an equally divided Court, 346 U. S. 929. That case gives us no aid in interpreting the Court's decision in *Heikkila.* It determined only that a deportation order which became final after the 1952 Act went into effect could be judicially reviewed other than by habeas corpus.

Appellant's present suit is in no real sense a new action. It is but a repetition or continuation of the litigation theretofore unsuccessfully waged. We have no alternative but to hold that the earlier decision of the Supreme Court is res judicata.

The dismissal is affirmed.

Pope, Circuit Judge, concurring:

I concur in the affirmance of the judgment. I arrive at the same result by a somewhat different route.

The complaint considered in *Heikkila v. Barber,* 345 U.S. 229, was filed before the 1952 Act was passed, and

the authority of the trial court to entertain it would normally be judged by the law in effect when the complaint was filed. The Supreme Court was not called upon to observe, either in passing, or otherwise, that a *new* action, instituted after the effective date of the 1952 Act, might or might not have a better standing.[1] Because the complaint there in question was filed prior to the 1952 Act, the issue as to the operation of the new act was not only not litigated but it was not an issue that might have been litigated. The decision, I think, was not res judicata.

To my mind, therefore, the controlling question is whether the 1952 Act did, as appellant asserts, have the retroactive effect of permitting a new action, such as this one, for the purpose of reviewing deportation orders made prior to the 1952 Act. As the opinion of the majority observes, *Rubinstein v. Brownell,* 206 F. 2d 449, is no help on that point, for the order there involved was made after the effective date of the 1952 Act. Even if we were to grant, as there held, that the 1952 Act created a new remedy, I am convinced it cannot be said to have the retroactive effect here claimed for it. A primary reason given for the District of Columbia court's conclusion that the remedy for review of such orders there sustained was provided in the 1952 Act, was the use in § 242(b)(4), (Title 8,

[1]That the decision of the Supreme Court was thus confined to the status of the former complaint would seem to be especially clear in view of the language of the savings clause in §405 of the 1952 Act: "Nothing contained in this Act . . . shall be construed . . . to affect any prosecution, suit, action, or procedure, civil or criminal, brought . . . at the time this Act shall take effect. . . ."

U.S.C.A. § 1252(b)(4)) of the words: "no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence". To my mind, this language can refer only to future, and not to past orders.

Another persuasive reason for concluding that the 1952 Act was not intended to apply, even procedure-wise, to earlier orders, is found in the strong language of the savings clause, § 405(a) of the Act, (see 8 U.S.C.A. § 1101 note), which was quoted in this court's decision in *Yanish v. Barber,* 211 F. 2d 467, at 470.[2]

Since I am of the view that any new procedure which may have been authorized by the 1952 Act was not intended to apply to the order here in question, I agree that the decision of the district court must be affirmed.

(Endorsed:) Opinion and Concurring Opinion. Filed Oct. 13, 1954. Paul P. O'Brien, Clerk.

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[2]I agree with the majority that the whole tone of the Supreme Court's opinion in Heikkila v. Barber, supra, indicates that the court did not conceive its being possible that the 1952 Act retroactively extended a new remedy to the order here involved. I have explained above, however, why I think that issue was neither decided no open to decision in that case. The court *affirmed* the action of the district court. Had the district court sustained the action, so that it was necessary that its judgment be *reversed,* as in Missouri Pacific Ry. v. United States, 189 U.S. 274, the failure also to remand for further proceedings under the new act, might call for a different conclusion as to the effect of the decision.

United States Court of Appeals
for the Ninth Circuit

William Heikkila, Appellant, vs. Bruce G. Barber, Individually and as District Director of Immigration and Naturalization Service, Appellee.	No. 13,988

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted:

On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is, affirmed.

(Endorsed:) Judgment. Filed and entered October 13, 1954. Paul P. O'Brien, Clerk.